In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 316

W. C. NABORS, D/B/A W. C. NABORS COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R-141-147) [1] is reported at 196 F. 2d 272. The findings of fact, conclusions of law, and order of the Board (R. 67-140) are reported at 89 NLRB 538.

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[1] The symbol "R" refers to the transcript of the record. The symbols "B. A." and "R. A." refer to the appendices to the briefs in the court below of the Board and petitioner, respectively.

JURISDICTION

The judgment of the court below (R. 147) was entered on April 29, 1952. Petitioner's application for rehearing, filed on June 2, 1952 (R. 148-154), was denied on June 6, 1952 (R. 155). The petition for a writ of certiorari was filed on September 4, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 and Section 10(e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether, as the court below held, the Board's findings of fact are supported by substantial evidence on the record considered as a whole.

2. Whether the Board properly found that certain statements made by petitioner were coercive.

3. Whether petitioner is responsible under the Act for the coercive conduct of his supervisory personnel.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 12-15.

STATEMENT

Following the usual proceedings under Section 10 of the Act, the Board, on April 19, 1950, issued its findings of fact, conclusions of law, and order (R. 67-140). The Board found that petitioner had interfered with, restrained, and coerced his employees in violation of Section 8(a)(1) of the Act by threatening them with economic reprisals, by interrogating them concerning their union sympathies

and activities, and by assisting them in the circulation of an anti-union petition. The Board also found that petitioner had discriminatorily discharged or laid off 19 employees in violation of Section 8(a)(3) and (1) of the Act. The Board's subsidiary findings and the supporting evidence may be summarized as follows:[2]

On March 13, 1948, a group of petitioner's employees, having become dissatisfied with their wages, met with H. V. Smith, a business representative of the International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, A.F.L., Local No. 79 (herein called the Union) in Shreveport, Louisiana, to discuss the possibility of organizing petitioner's plant (R. 101; B. A. 8, 18-19, 59, 159). Upon learning of the employees' union activities, petitioner and his supervisors undertook, by means of threats, interrogation, and discharge, to defeat the Union's organizational drive.

On March 15, two days after the employees' initial contact with the Union, Foreman Troegel warned employee Norwood, one of the union leaders, that petitioner "is just hard headed enough to shut [the plant] down before he will let the union come in here" (B. A. 24). On or about March 23, two days after a union organizational meeting was held, Supervisor Spears questioned Norwood about the attendance at that meeting (R.

[2] In the following statement, the record references preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

118-119; B. A. 24-25). On March 24, Spears warned Norwood about the "traffic" he was getting in signing the men up and told him he had better move his union business because "Old Man Edge [the guard] had his eyes on you" (B. A. 25, 299). The next day, March 25, Norwood was discharged (R. 75; B. A. 21). A few days after the discharge, Prothro, a supervisor (B. A. 295), admitted to an employee that Norwood had been laid off because of his union activity and expressed the hope that "none of my boys is in on this union" (R. 76; B. A. 142-143). About the same time, Wilfred Nabors, a first cousin of petitioner and foreman of the body shop, warned an employee that petitioner was going to do away with all union members, and stated "You know that one man done got laid off on account of this union" (R. 109, 118; B. A. 88, 302, 303).

Despite petitioner's campaign of interference and coercion, however, the Union succeeded in signing up 106 employees by March 26, 1948 (R. 101, 102; B. A. 12, 30, R. A. 9).

On that day, an hour and a half before he was scheduled to meet with Union Representative Smith to discuss recognition of the Union, petitioner Nabors assembled his employees and delivered a speech. While he stated in the course of his remarks that it was the employees' individual privilege to join or not to join, to vote or not to vote for the Union, he warned that if the Union came into the plant he would cut the work week from 45 hours to 40 (R. 102, 107, 117-118; B. A. 38,

52, 62-63, 105, 118, 176, 194), and announced that talking union on company time would not be permitted (R. 115; B. A. 43, 53, 66, 118, 229). He closed the meeting by telling the men that he was going to a conference with a man who wanted to get on their payroll, not his (R. 102; B. A. 38, 176).

The next day, in the course of a conversation with employee Ogden, petitioner cautioned Ogden that he was hurting himself by joining the Union, stating: "You'll be cutting your wages. At the end of the year you'll come out with about $700 less * * * and you won't be working but 40 hours a week * * *. I've got mine made. I've not got to run this thing. I can shut this down you know * * * there is a lot of boys here just like you Ogden, just buying their homes and trying to pay for them working in the plant. * * *If I shut this plant down, all of them would lose their homes and wouldn't have anything or any place for their wife and kids" (R. 107; B. A. 195).

During the period immediately following Nabors' speech, supervisors repeatedly questioned employees concerning their union activities and warned them against aligning themselves with the Union. Foreman Nabors, cousin of petitioner, interrogated several employees to find out who attended union meetings and which employees had signed union membership applications; he also told three of them (Solice, Leroy Brown, and Ryan) that petitioner "is going to do away" with the union employees and reduce the work week (R. 108-109, 118-120; B. A. 47-49, 87-88, 93-94, 98-100,

135-136, 208-209, 305, 309). Foreman Timmons commented in similar vein to employees Adams, Whitten, and Coward (R. 110, 119-120; B. A. 64, 114, 123, 230). Adams was further warned by Supervisor Segura that after shutting down the plant, petitioner will only "hire back the ones that didn't join the union" (R. 119; B. A. 115, 11). Supervisor Robertson told employee Welborn that the "boys are sure going to get messed up if they keep fooling with it" (R. 119; B. A. 79-80).

On April 8, 1948, because of a steel shortage, petitioner reduced the work force by ten percent (R. 104, 124; B. A. 279). Twenty-six employees were discharged on that day, leaving 219 at the plant (R. 70, 123; B. A. 223, 333-348, R. A. 334). Of the twenty-six employees laid off, twenty-three (88.5 percent) were union adherents. At that time the Union had procured a membership of only 106, approximately 43 percent of petitioner's employees (R. 123; R. A. 9). The twenty-three discharged employees included the instigators of the organizational drive, all the elected officials of the Union, and its staunchest adherents (R. 73, 75-85, 127; B. A. 8-11, 41-42, 59, 73-74, 79, 82-83, 90, 101, 103, 107, 121-122, 130-133, 137, 141, 150-153, 158-159, 163, 166-167, 172-173, 175, 183-187). In almost all cases petitioner ignored seniority in service (R. 76-83; B. A. 39, 65, 100, 108-109, 144-145, 318, 333-348). Moreover, practically all the employees involved in this proceeding testified, without contradiction, that petitioner had never criticized their past performance (R. 76-83; B. A. 43, 66, 103, 107,

113, 124, 137, 142, 146, 157, 171-172, 180-181, 247, 310, 323, 325, 327, R. A. 402), and petitioner and his supervisors admitted that a number of them were "good workers" (R. 81, 82; B. A. 234, 241, 306, 310, 327). Nevertheless, petitioner failed to consider any of the laid-off employees for reinstatement when he increased his staff in October, 1948, although almost all of them had requested reinstatement (R. 126-127; B. A. 53, 54, 55, 69-70, 81, 84, 96, 128, 156, 270, 274-275). The Board found that although a shortage of materials justified the layoff of some employees, 18 of the 26 were selected for layoff on a discriminatory basis (R. 70-86).

On April 12, 1948, the Union filed with the Board a petition for certification of bargining representatives. On June 30, 1948, two days before the hearing set on the petition, several employees circulated a petition of their own stating that the employees did not "need" a union; 158 employees signed this anti-union petition. (R. 114-115; B. A. 198, 213, 281-287.) Petitioner instructed Foreman Moak not to stop the movement of the anti-union petition in the plant, even during business hours (R. 115; B. A. 234). Another foreman openly warned an employee that he "better" sign the anti-union petition for otherwise "they might fire" him (R. 116, 120; B. A. 219).

Later, in one of several conversations held with employee Ogden just before the representation election on September 14, 1948, petitioner declared that he had not yet laid off all his union employees and "if you boys are represented by the Union,

you won't get any more bonus. That will be cut out * * *" (R. 107-108, 120; B. A. 202-204). The Union lost the election by a substantial majority (R. 105).

Upon the basis of the foregoing findings, the trial examiner and the Board concluded that petitioner had violated Section 8 (a) (1) and (3) of the Act. The Board ordered petitioner to cease and desist from the unfair labor practices found; to offer reinstatement to all of the employees discriminated against except two employees who did not desire reemployment; to make whole all the discharged employees for any losses they had incurred because of petitioner's discrimination; and to post appropriate notices (R. 87-91).

Enforcing the Board's order in full (R. 141-147), the court below held that "On the record as a whole, the Board's findings are supported by credible evidence," pointing out that "Although the evidence is in some respects circumstantial and contradictory, considered in the light of all the circumstances the proof makes a strong case against [petitioner]" (R. 145, 146). Rejecting petitioner's contention that his speech to the employees on March 26, 1948 and statements on other occasions did not constitute interference, restraint and coercion, but were privileged under Section 8 (c) of the Act, the court stated, "When statements such as these are made by one who is a part of the company management, and who has the power to change prophecies into realities, such statements, whether couched in language of proba-

bility or certainty, tend to impede and coerce employees in their right of self-organization, and therefore constitute unfair labor practices" (R. 146).

ARGUMENT

Nothing in the petition poses any question of general importance in the administration of the Act, and the cases relied on by petitioner present no conflict with the decision of the court below.

The challenge to the substantiality of the evidence raises "a question which Congress has placed in the keeping of the Courts of Appeals" (*Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, 491) and does not warrant further review by this Court. Moreover, as the Statement shows (pp. 3-8, *supra*), and as the court below found (R. 145), the "proof makes a strong case against [petitioner]."[3]

Petitioner's contention (Pet. 18-21) that his statements to his employees were non-coercive expressions of opinion is wholly devoid of substance. These statements, which included threats of economic reprisal if the plant became unionized, were coercive on their face. And the fact that there was no evidence that the statements actually op-

[3] Petitioner contends that the Board improperly found his failure to take seniority into account in laying off employees to be evidence of discriminatory motivation. But this argument, predicated on the claim that seniority had never been a factor in the lay-off of petitioner's employees, is refuted by his own testimony at the hearing that he did "of course" take into account "the men who have been with the company the shortest period of time" (R. A. 291, 288).

erated to restrain and coerce particular employees is immaterial.[4]

Petitioner's characterization of his coercive statements and those of his supervisors as "isolated" and "sporadic" (Pet. 18-21) is equally unwarranted. The numerous threats, interrogations and coercive acts in which petitioner engaged find no parallel in any of the cases on which he relies.

Petitioner's final contention (Pet. 21-22), that he was not responsible for the coercive conduct of his supervisors because there was no evidence that such conduct was "authorized or ratified" by him, is foreclosed by the express provision in Section 2 (13) of the Act (Appendix, *infra*, p. 12) that in determining a principal's liability for the acts of his agents "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."[5]

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[4] See, *e.g.*, *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U.S. 219, 231; *National Labor Relations Board* v. *Brezner Tanning Co.*, 141 F. 2d 62, 64 (C.A. 1); *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 814 (C.A. 7).

[5] This section, incorporated into the Act by the 1947 amendments, is a statutory affirmation of the principle established by this Court in *International Association of Machinists* v. *National Labor Relations Board*, 311 U.S. 72, 80-81; *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U.S. 514, 518-521; and *National Labor Relations Board* v. *Link-Belt Co.*, 311 U.S. 584, 598-599.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER, 1952.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are as follows:

DEFINITIONS

Sec. 2. When used in this Act—

* * * * *

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

* * * * *

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from

such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has

not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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